

12-22-2011

Quemada v. Arizmendez Augmentation Record Dckt. 38831

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Quemada v. Arizmendez Augmentation Record Dckt. 38831" (2011). *Idaho Supreme Court Records & Briefs*. 3321.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3321

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE ESTATE OF
RICHARD ENRIQUEZ ORTEGA.

DANIELLE QUEMADA, Personal
Representative of THE ESTATE OF
RICHARD ENRIQUEZ ORTEGA.

Petitioner-Appellant,

v.

EFREN A. ARIZMENDEZ, GILBERT
ACOSTA, JR.,

Respondents.

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket No. 38831-2011
Owyhee County Docket No. 2010-1389

A MOTION TO AUGMENT CLERK'S RECORD was filed by counsel for Respondents on December 15, 2011. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondents' MOTION TO AUGMENT CLERK'S RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Motion for Summary Judgment/Notice of Hearing, file-stamped February 23, 2011;
2. Memorandum in Support of Summary Judgment, file-stamped February 23, 2011;
3. Affidavit of Efrén Arizmendez, file-stamped February 23, 2011;
4. Affidavit of Gilbert Acosta, with attachment, file-stamped February 23, 2011;
5. Affidavit of Celia A. Ortega, with attachments, file-stamped February 23, 2011;
6. Respondents' Summary Judgment Reply Brief, file-stamped March 23, 2011;
7. Respondents' Supplemental Citations in Support of Summary Judgment, file-stamped March 31, 2011; and
8. Motion to Strike Reply to Supplemental Brief, file-stamped April 11, 2011.

ORDER GRANTING MOTION TO AUGMENT THE RECORD - Docket No. 38831-2011

DATED this 22 day of December 2011.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record

J. Jones

AUGMENTATION RECORD

ORDER GRANTING MOTION TO AUGMENT THE RECORD - Docket No. 38831-2011

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE ESTATE OF
RICHARD ENRIQUEZ ORTEGA.

DANIELLE QUEMADA, Personal
Representative of THE ESTATE OF
RICHARD ENRIQUEZ ORTEGA,

Petitioner-Appellant,

v.

EFREN A. ARIZMENDEZ, GILBERT
ACOSTA, JR.,

Respondents.

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket No. 38831-2011
Owyhee County Docket No. 2010-1389

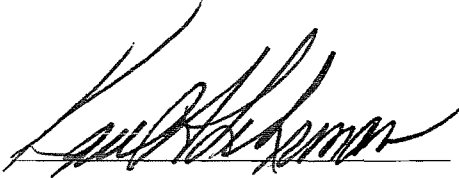
A MOTION TO AUGMENT CLERK'S RECORD was filed by counsel for Respondents on December 15, 2011. Therefore, good cause appearing,


IT HEREBY IS ORDERED that Respondents' MOTION TO AUGMENT CLERK'S RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Motion for Summary Judgment/Notice of Hearing, file-stamped February 23, 2011;
2. Memorandum in Support of Summary Judgment, file-stamped February 23, 2011;
3. Affidavit of Efren Arizmendez, file-stamped February 23, 2011;
4. Affidavit of Gilbert Acosta, with attachment, file-stamped February 23, 2011;
5. Affidavit of Celia A. Ortega, with attachments, file-stamped February 23, 2011;
6. Respondents' Summary Judgment Reply Brief, file-stamped March 23, 2011;
7. Respondents' Supplemental Citations in Support of Summary Judgment, file-stamped March 31, 2011; and
8. Motion to Strike Reply to Supplemental Brief, file-stamped April 11, 2011.

DATED this 22nd day of December 2011.

For the Supreme Court

A handwritten signature in black ink, appearing to read "Stephen W. Kenyon", written over a horizontal line.

 Stephen W. Kenyon, Clerk

cc: Counsel of Record

JAMES M. RUNSVOLD
Attorney at Law ISB #2975
623 S. Kimball Ave., Ste. C
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288

FILED
FEB 25 2011
CLERK OF DISTRICT COURT
IDAHO

Attorney for Respondents Efren A. Arizmendez and Gilbert Acosta, Jr.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF)	Case No. CV-10-01389
)	
)	MEMORANDUM IN SUPPORT
RICHARD ENRIQUEZ ORTEGA.)	OF SUMMARY JUDGMENT
)	
)	
)	
)	
Deceased.)	

COME NOW Respondents Efren A. Arizmendez and Gilbert Acosta, Jr.,
by and through their attorney of record James M. Runsvold and in support of their
motion for summary judgment filed herein provide the following:

UNDISPUTED FACTS

It is undisputed that decedent Richard Ortega, Jr., died November 13, 2009.
During his lifetime, he executed quitclaim deeds to the two real properties in dispute
herein, one located at 2081 Hill Road, Homedale, Owyhee County, Idaho, and the other
at 28901 El Paso Road, Canyon County, Idaho. Grantee on both deeds is Respondent
Gilbert Acosta, Jr. The deeds were given to Gilbert and duly recorded by him in Owyhee
and Canyon counties respectively, also during Decedent's lifetime.

The Homedale property was subsequently quitclaimed by Gilbert to Respondent
Efren Arizmendez. This deed was given to Efren and duly recorded by him in Owyhee
County.

CONTROLLING LAW

Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him....

Idaho Code Section 55-606 (inapplicable exception deleted).

A claim of fraud requires the plaintiff to establish nine elements with particularity: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

Chavez v. Barrus, 146 Idaho 212, 192 P.3d 1036, 1047 (2008).

It is stated generally that there are four elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence.

Gmeiner v. Yacte, 100 Idaho 1, 6-7, 592 P.2d 57 (1979).

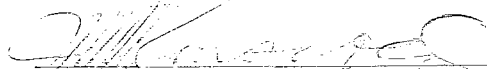
ARGUMENT

There is no admissible evidence to support all of the nine elements of fraud or the four elements of undue influence. The execution and delivery of the two deeds from Decedent to Gilbert Acosta, Jr., are not disputed. The execution and delivery of the subsequent deed from Gilbert to Efren Arizmendez are also not disputed. The Estate is claiming under the grantor, decedent Richard Ortega, and therefore is bound by the deeds.

The material facts not being in dispute, Respondents are entitled to summary judgment herein.

Respondents, if prevailing on the Homedale deed, should not be subject to incidental damages relating to the removal of Decedent's personal property from the Homedale home.

DATED this 22 day of FEBRUARY, 2011.


James M. Runsvold

JAMES M. RUNSVOLD
Attorney at Law ISB #2975
623 S. Kimball Ave., Ste. C
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288

Attorney for Respondents

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF)

Case No. CV-10-01389

RICHARD ENRIQUEZ ORTEGA,)

MOTION FOR SUMMARY

JUDGMENT

NOTICE OF HEARING

Deceased.

COME NOW Respondents Efren A. Arrizmendez and Gilbert Acosta, Jr., by and through their attorney of record James M. Runsvold and, pursuant to IRCP Rule 56(b), move for summary judgment herein as to the title of the real property and the secondary issue of damages for the removal of personal property from one of the real properties on the grounds and for the reasons that the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving parties are entitled to a judgment as a matter of law.

The above and foregoing matter shall be heard on the 25th day of March, 2011 at the Owyhee County Courthouse, 20381 State Hwy 78, Murphy ID at the hour of 10:30 a.m. or as soon thereafter as the matter may be heard.

DATED this 22 day of FEBRUARY, 2011.


James M. Runsvold

FILED
FEB 23 2011

CHARLOTTE SHULOVIN, CLERK
CLERK OF DISTRICT COURT

*Judge: Motion under advisement /
fully submitted on the
record consisting of 1) Dandy
Avila AF 2) E112, Ortega
aff. 3) sworn
statement of Celia
4) " " " Gilbert
5) Original, verified
complaint - from
record ID'd by
Pleaser -
Judge gave me
till April 4
to cite any
further
cases
in support,
if desired*

JAMES M. RUNSVOLD
Attorney at Law ISB #2975
623 S. Kimball Ave., Ste. C
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288

FILED
JAN 23 2011
CLERK OF DISTRICT COURT
THIRD JUDICIAL DISTRICT
IDAHO

Attorney for Respondents

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

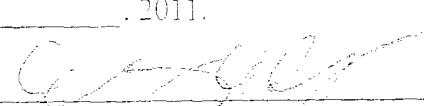
IN THE MATTER OF THE ESTATE OF	)	Case No. CV-10-01389
)	
	)	AFFIDAVIT OF
RICHARD ENRIQUEZ ORTEGA,	)	EFREN ARIZMENDEZ
)	
)	
)	
)	
<u>Deceased.</u>)	

COMES NOW Efren Arizmendez who being first and duly sworn on oath,
deposes and says:

1. I am at least 18 years of age and testify from personal knowledge.
2. I am one of the Respondents herein.
3. On or about February 24, 2010, Gilbert Acosta, Jr., delivered to me the quitclaim deed attached as Exhibit A to the Affidavit of Gilbert Acosta, Jr. The deed was for the Homedale property formerly owned by decedent Richard Ortega, Sr.
4. I received the deed with the intent that Gilbert's entire right, title and interest to the property would then and there pass to me.
5. Richard told me many times before he signed the deed for the Homedale property and after, including at his birthday party on [REDACTED] that he wanted my daughter [REDACTED] to eventually have that property. I intend to hold it for her until she is old enough to receive legal title and then deed it to her, in accordance with Richard's wishes.

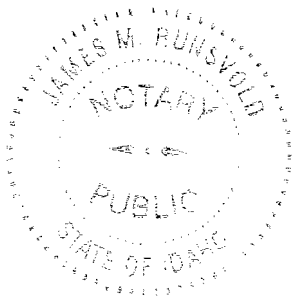
FURTHER. Affiant sayeth not.

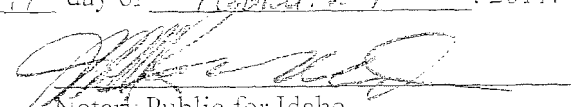
DATED this 11 day of FEBRUARY, 2011.


Efrén A. Arizméndez

STATE OF IDAHO)
)ss.
County of Canyon)

Subscribed and sworn to before me this 11 day of FEBRUARY, 2011.




Notary Public for Idaho
Residing in Caldwell
My commission expires: 9-15-2014

JAMES M. RUNSVOLD
Attorney at Law ISB #2975
623 S. Kimball Ave., Ste. C
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288

Attorney for Respondents

FILED
FEB 23 2011
CLERK OF DISTRICT COURT
IDAHO

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF)	Case No. CV-10-01389
)	
)	AFFIDAVIT OF
RICHARD ENRIQUEZ ORTEGA,)	GILBERT ACOSTA, JR.
)	
)	
)	
)	
Deceased.)	

COMES NOW Gilbert Acosta, Jr., who being first and duly sworn on oath,
deposes and says:

1. I am at least 18 years of age and testify from personal knowledge. I am one of the Respondents herein.
2. Exhibit A hereto is a true and correct, certified, copy of a deed to certain Owyhee County, Idaho, real property commonly known as 2081 Hill Road, Homedale, Idaho, and as more particularly described therein, which was executed by me on or about February 24, 2010, and delivered by me to the grantee Efren Anthony Arizmendez, one of the Respondents named in the above-captioned matter, on or about said date.
3. My intention in making and delivering such deed was to then and there convey all of my right, title, and interest in and to such property to Efren the grantee named therein. I was carrying out Decedent Richard Ortega's wish, as expressed to me by him, that the property would go to Efren's daughter [REDACTED] when she becomes an adult. Richard had told me on numerous occasions that he wanted the property to go to Desiré, most recently at his birthday party on or about September 14,

2009. I believed that Efren would be the proper person to hold it for her and to decide when to deed it to her. so I deeded it to him following Richard's death.

4. When I received and accepted the quitclaim deeds which are attached as Exhibits A, B and C to the Affidavit of Celia Ortega, it was with the intent that they would convey to me all of the right, title, and interest of the grantors Richard Ortega, Sr., the Decedent above-named, and Celia Ortega, in and to such property Richard intended that the Homedale property be "held in trust" for Desiré, and I agreed.

5. Richard asked me on at least four occasions to take him to a title company so that he could do the deeds. I finally did take him to Title One, in Caldwell, along with my mother Celia Ortega. Title One had Owyhee County e-mail up the deed for the Homedale property so that it could be signed in Caldwell. Richard and Celia then signed the deeds to the Homedale and El Paso Road properties, and gave them to me. I then took the El Paso Road deed to the Canyon County Recorder's office and had it recorded, and the Homedale deed to the Owyhee County Recorder's office and had it recorded.

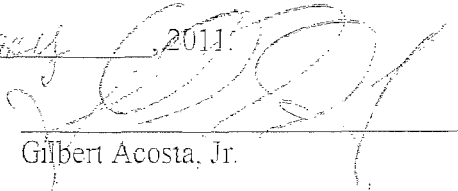
6. On December 31, 2008, when I took the El Paso Road deed to the Canyon County Recorder for recording, along with another deed to other property, the recorder's office mixed-up the papers and attached the other deed's legal description to the deed in question. The deed was recorded with the wrong legal description. A true and correct, certified, copy of the deed with the wrong legal description, as recorded on December 31, 2008, is Exhibit B to Celia's affidavit.

7. When it came to my attention that the mix-up had occurred, I so advised Celia and she re-recorded the deed with the correct legal description attached, on January 16, 2009, and delivered the corrected deed to me. A true and correct, certified, copy of the deed with the correct legal description, as recorded on January 16, 2009, is Exhibit C to Celia's affidavit.

8. The deeds signed by Richard were delivered to me during his lifetime.

FURTHER, Affiant sayeth not.

DATED this 15 day of FEBRUARY, 2011.


Gilbert Acosta, Jr.

STATE OF _____)
AFFIDANT OF GILBERT ACOSTA, JR.

State of California

County of San Diego)SS.

Subscribed and sworn to before me this 15 day of February, 2011.

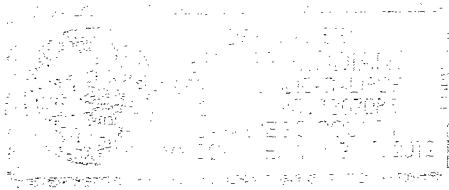
Ester Rodin

Notary Public for California

Residing in San Diego

My commission expires:

Aug. 17, 2012



QUITCLAIM DEED

FOR VALUE RECEIVED,

GILBERT ACOSTA, JR, SINGLE MAN [Grantor] (s)

does (do) hereby convey, release, remise and forever quit claim unto

EFREN ANTHONY ARIZMENDEZ, A MARRIED MAN [Grantee] (s)

whose current address is:

28112 WEST TRAIL WAY CALDWELL ID 83607 [Grantees Address], the following

described premises: [Legal Description]

PLEASE SEE EXHIBIT A

TO HAVE AND TO HOLD the said premises, unto the said grantees, heirs and assigns forever.

Date: 2/24/2010

By

Grantor

Grantor

Instrument # 270414

MURPHY, OWYHEE, IDAHO

2-25-2010 08:56:03 No. of Pages: 2

Recorded for: EFREN A ARIZMENDEZ

CHARLOTTE SHERBURN

Fee: 6.00

Ex-Officio Recorder Deputy Peterson

Index to: DEED, QUIT-CLAIM

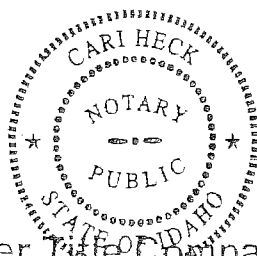
State of Idaho

)

) S.S.

County of Canyon

On this 24th day of February, in the year 2010, before me the undersigned
Gilbert Acosta, Jr., personally appeared Gilbert Acosta, Jr.
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is(are) subscribed to
the within instrument, and acknowledged that he/she/they executed the same.



Cari Heck

Notary Public

My Commission Expires on 11/2/2013

Pioneer Title Company of Canyon County

EXHIBIT (A)

EXHIBIT A

This parcel is a portion of the NW 1/4 NE 1/4 of Section 31, Township 4 North, Range 5 West of the Boise Meridian, Owyhee County, Idaho and is more particularly described as follows:

BEGINNING at the northwest corner of said NW 1/4 NE 1/4;

Thence North 89° 32' 21" East along the north boundary of said NW 1/4 NE 1/4 a distance of 374.29 feet to a point on the centerline of a ditch as it now exists;

Thence traversing said centerline as follows:

South 36° 27' 49" East a distance of 52.33 feet;

South 29° 32' 00" East a distance of 25.58 feet;

South 29° 12' 41" East a distance of 24.09 feet;

South 39° 13' 57" East a distance of 107.15 feet;

Thence leaving said centerline of ditch and traversing a curve to the left having a central angle of 33° 22' 23", a radius of 1375.00 feet, an arc length of 800.89 feet and a long chord which bears South 38° 54' 44" West a distance of 789.62 feet to a point on the centerline of an existing ditch;

Thence North 00° 32' 38" West along said centerline a distance of 787.85 feet to the POINT OF BEGINNING.

Reserving there from a 20.00-foot wide irrigation easement along the Southeastly boundary of said above described property.

JAMES M. RUNSVOLD
Attorney at Law ISB #2975
623 S. Kimball Ave., Ste. C
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288

Attorney for Respondents

FILED
JAN 29 2011
FEB 23 2011
CLERK OF DISTRICT COURT
CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF)	Case No. CV-10-01389
)	
)	AFFIDAVIT OF
RICHARD ENRIQUEZ ORTEGA,)	CELIA A. ORTEGA
)	
)	
)	
)	
)	
Deceased.)	

COMES NOW Celia A. Ortega, who being first and duly sworn on oath, deposes and says:

1. I am at least 18 years of age and testify from personal knowledge.
2. Exhibit A hereto is a true and correct copy of a deed to certain Owyhee County, Idaho, real property commonly known as 2081 Hill Road, Homedale, Idaho, and more particularly described therein, which was executed by my late ex-husband Richard Ortega, Sr., the Decedent above-named, and me on or about December 30, 2008, and delivered by us to the grantee, Gilbert Acosta, Jr., one of the Respondents named in the above-captioned matter, on that same day.
3. Gilbert took the Homedale deed to the Owyhee County Recorder's Office and recorded it on December 31, 2008.
4. On or about December 30, 2008, Decedent and I executed a quitclaim deed conveying certain Canyon County, Idaho, real property commonly known as 28901 El Paso Road, Caldwell Idaho and more particularly described therein, which was delivered by us to the grantee, Respondent Gilbert Acosta, Jr., on that same day.

AFFIDAVIT OF CELIA A. ORTEGA Page-2

Order No.: PO6678
Policy No.: J1348892
Form No. 1402.92 (10/17/92)

EXHIBIT A

Amount of Insurance: \$251,000.00
Premium: \$1,058.00
Date of Policy: March 3, 2005 @ 4:36 p.m.

1. Name of insured:

RICHARD E. ORTEGA and CELIA A. ORTEGA

2. The estate or interest in the land which is covered by this policy is.

Fee Simple

3. Title to the estate or interest in the land is vested in:

RICHARD E. ORTEGA and CELIA A. ORTEGA, husband and wife

4. The land referred to in this policy is described as follows:

This parcel is a portion of the Northwest Quarter of the Northeast quarter of Section 31, Township 4 North, Range 5 West of the Boise Meridian, Owyhee County, Idaho and is more particularly described as follows:

BEGINNING at the Northwest corner of said Northwest Quarter of the Northeast Quarter; thence

North 89° 32' 21" East along the North boundary of said Northwest Quarter of the Northeast Quarter a distance of 374.29 feet to a point on the centerline of a ditch as it now exists; thence traversing said centerline as follows:

South 36° 27' 49" East a distance of 62.33 feet;

South 29° 32' 00" East a distance of 25.58 feet;

South 29° 12' 41" East a distance of 24.09 feet;

South 39° 13' 57" East a distance of 107.15 feet; thence leaving said centerline of ditch and traversing a curve to the left having a central angle of 33° 22' 23", a radius of 1375.00 feet, an arc length of 800.89 feet and a long chord which bears

South 38° 54' 44" West a distance of 789.62 feet to a point on the centerline of an existing ditch; thence

North 00° 32' 38" West along said centerline a distance of 787.85 feet to the POINT OF BEGINNING.

008067839

RECORDED

DEC 31 AM 9 14

WILLIAM H. HURST
NOTARY PUBLIC

QUESTIONS ABOUT THIS DEED
CALL 606-611-1111

QUITCLAIM DEED

FOR VALUE RECEIVED, RICHARD E. ORTEGA, SR. AND CELIA ORTEGA, HUSBAND AND WIFE
does hereby convey, release, remise and forever quit claim unto
GILBERT ACOSTA, JR whose current address is:
28901 EL PASO RD, CALDWELL ID 83607
the following described premises:

[Legal Description]

Exhibit A

TO HAVE AND TO HOLD the said premises, unto the said grantees, heirs and assigns forever.

Date: DECEMBER 30, 2008

By: Celia Ortega
[Grantor's Name]

CELIA ORTEGA

Richard Ortega SR.

Richard ORTEGA SR.

State of Idaho)
) S.S.
County of Canyon)

On this 30th day of December, in the year of 2008, before me
the undersigned, personally appeared Richard E Ortega, Sr & Celia Ortega,
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is (are)
subscribed to the within instrument, and acknowledged that he (she)(they) executed the same.

Matt A. Caba
Notary Public Notary ID
My Commission Expires on 6-5-2011

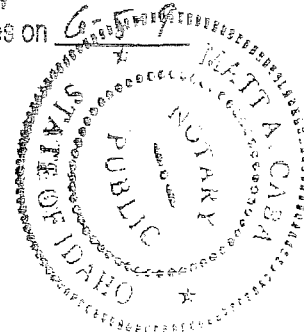


EXHIBIT (B)

BEGINNING at the Westerly corner of Lot 14 in Block 15 of the GOLDEN GATE ADDITION to Caldwell, Idaho, according to the official plat thereof on file and of record in the office of the County Recorder of Canyon County, Idaho; run thence

Northeasterly along the boundary line between Lots 14 and 15 in said Block 15 (and along said line extended) a distance of 120 feet to the Southwesterly boundary line of Fifth Street (now known as Freeport Street of the City of Caldwell); thence at right angles run

Southeasterly a distance of 50 feet to the Northwesterly boundary line of First Avenue West (now known as Seventh Avenue); thence run

Southwesterly along the Northwesterly boundary line of said First Avenue West (now known as Seventh Avenue) a distance of 120 feet; thence run

Northwesterly 50 feet to the POINT OF BEGINNING.

The tract here conveyed being all of fractional Lot 14 in Block 15 as numbered and designated on the official plat of GOLDEN GATE ADDITION to Caldwell, Idaho, and a portion of the Southwest Quarter of the Northeast Quarter of Section 22, Township 4 North, Range 3 West of the Boise Meridian, Canyon County, Idaho adjacent to said Lots, making the tract here conveyed 50 feet by 120 feet in size.

QUITCLAIM DEED

WILLIAM H. BURST
JANUARY ENTRY RECORDER
RECEIVED
TYPE 100
6-1

REGISTRATION

2008067839

Exhibit A

TO HAVE AND TO HOLD the said premises, unto the said grantees, heirs and assigns forever.

Date: DECEMBER 30, 2008

By: Celia Ortega
[Grantor's Name]

CELIA ORTEGA

Richard O. Long SR

Richard O'NEAL SR.

State of Idaho)
) S.S.
County of Canyon)

On this 30th day of December, in the year of 2008, before me
the undersigned, personally appeared Richard G Ortega, Sr & Celia Ortega
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is (are)
subscribed to the within instrument, and acknowledged that he (she)(they) executed the same.

Notary Public *Nampa ID*
My Commission Expires on *6-5-19*

200902235

RECORDED

602 1917 18 PM 3 24

WILLIAM C. HURST
CANYON CITY RECORDER
BY *[Signature]*

Belinbena

NOTARY PUBLIC
STATE OF IDAHO
JAN 1 1968

EXHIBIT (C)

Exhibit A

Part of the Northeast Quarter of the Northeast Quarter of Section 9, Township 5 North, Range 3 West, Boise Meridian, Canyon County, Idaho, more particularly described as follows:

COMMENCING at the Northeast corner of said Section 9, the POINT OF BEGINNING; thence
West 395 feet along the North boundary of said Section 9; thence
South 660 feet parallel with the East boundary of said Section 9; thence
East 395 feet parallel to the North boundary of said Section 9 to the East boundary of said Section 9; thence
North 660 feet along the East boundary of said Section 9 to the POINT OF BEGINNING

JAMES M. RUNSVOLD
Attorney at Law ISB #2975
623 S. Kimball Ave., Ste. C
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288

FILED
MAR 23 2011
CHARLOTTE SHERBURN, CLERK
CLERK OF DISTRICT COURT

Attorney for Respondents Efren A. Arizmendez and Gilbert Acosta, Jr.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF)	Case No. CV-10-01389
)	
)	RESPONDENTS' SUMMARY
RICHARD ENRIQUEZ ORTEGA,)	JUDGMENT REPLY BRIEF
)	
)	
)	
)	
Deceased.)	

I. THE PERSONAL REPRESENTATIVE HAS NOT RESPONDED TIMELY, TO
RESPONDENTS' PREJUDICE.

The Personal Representative's response to Respondents' summary judgment motion was due fourteen (14) days before the hearing. IRCP Rule 56(c). It was not served until the afternoon of a Friday seven (7) days before the hearing. This delay has prevented Respondents from having the week to respond prior to the due date of their reply, id., putting undue time pressure on them.

The time limits have not been shortened for good cause shown. Sun Valley Potatoes, Inc. v. Rosholt, Robertson and Tucker, 133 Idaho 1, 5-6, 981 P.2d 236, 240-41 (1999). Therefore, the Elizabeth Ortega affidavit filed with Personal Representative's response should be stricken.

II. THE PERSONAL REPRESENTATIVE'S RESPONSE DOES NOT COMPLY WITH THE
RULE.

Rule 56(e) requires that the responding party "must set forth specific facts...." The Personal Representative's general references, to "the verified petition and other pleadings, affidavits submitted to the lower court, sworn testimony before the lower court..." Response to Motion for Summary Judgment, p. 3; are not sufficient. Additionally, the affidavits contain

inadmissible hearsay, generally of the form, "Celia told decedent who told me". Such inadmissible evidence cannot be considered in a summary judgment. Id.

III. AMENDED PETITION NOT VERIFIED.

Whereas the Personal Representative's original Petition to Set Aside Deeds filed April 20, 2010, is verified, the Amended Petition to Set Aside Deeds served November 9, 2010, is not, to Respondents' knowledge (copy served is not verified). Therefore, the Amended Petition cannot be considered to have the same effect as an affidavit in summary judgment, even had it been couched in non-conclusory terms and had it stated facts clearly within the personal knowledge of the Personal Representative. Camp v. Jiminez, 107 Idaho 878, 880-82, 693 P. 2d 1080, 1082-84 (Ct. App. 1984).

IV. THE PERSONAL REPRESENTATIVE'S ALLEGATIONS OF FACT ARE INCOMPLETE, CONCLUSORY, SELF CONTRADICTIONARY, AND APPEAR NOT TO BE BASED ON ADMISSIBLE EVIDENCE.

A. Fraudulent transfer claim.

The closest the Personal Representative comes to setting forth any specific facts to support her fraud claim is in the unsworn Amended Petition, Second Cause of Action, in which she asserts, in conclusory fashion only, certain facts presumably meant to cover the nine elements of fraud. These are set out in paragraphs 31-37 of the Amended Petition.

The Personal Representative's allegations are internally inconsistent. For example, the Personal Representative asserts that "Celia stated the deeds were given to Gilbert to avoid creditors", id., para 16. The Personal Representative presents no evidence to show that that objective was not accomplished by quitclaiming the property, i.e., that Celia's representation was false.

One essential element of a fraud claim is damages. Personal Representative's factual allegation with regard to the damages element is that she "has been damaged as a result of Celia Ortega's misrepresentations because she will not inherit her share of decedent's estate if the quitclaim deeds are given effect", id., para. 37. Damage to decedent is not alleged, and the Personal Representative's "damages" arise only from an expectancy of an inheritance. The Court has already ruled that she has made no claim based on an interference with expectancy of inheritance, Mem. Dec. and Order on Rule 12(b) Motion, January 3, 2011, p.3; and therefore the Personal Representative could have suffered no damages based on such a theory.

Finally, the Personal Representative alleges that she only became aware after the fact of the fraudulent conduct alleged to have occurred starting in 1985 through November, 2009: "Petitioner discovered Celia Ortega's fraudulent conduct within the last year". Amended Petition, para. 38. In other words, she has no personal knowledge of it, including particularly what transpired around the execution of the quitclaims in December, 2008. Further, she has presented no potentially admissible evidence as to those events beyond decedent's ex-wife's (her mother's) affidavit opposing the summary judgment, Elizabeth Ortega affidavit, served March 18, 2011.

B. Undue Influence Claim.

The only arguably relevant evidence proffered by the Personal Representative in her summary judgment papers supporting the "result" element of her undue influence theory is in the affidavit of Elizabeth Ortega, decedent's ex-wife. Ms. Ortega testified that:

1. In the fall of 2009 (which would have been nearly a year after the deeds were executed), decedent expressed "[h]is plan...to sell his house in Idaho and then buy property in Arizona".
2. In the summer of 2009 (which would have been half a year after the deeds were executed) decedent said "he wanted his house to go to his daughter, Danielle, because she would divide it evenly between his three children."
3. Just before Halloween, 2008, decedent "said that Celia was bringing papers to him to sign to get her name off his house to protect it from creditors."

Two of these three statements are after the relevant time, which is when the quitclaims were executed (December 30, 2008). The third is not inconsistent with the result achieved by quitclaiming the Homedale property to decedent's step-son, Respondent Gilbert Acosta.

However, the "result" element of undue influence, as presented in the Personal Representative's briefing, relates to decedent's alleged "intent to pass his house to his three children." Her theory is that decedent's intended result of having the Homedale property go to his three children was not achieved because the result is that it has gone to Respondent Acosta. If that is the "result" element, as the Personal Representative has asserted, then she must present admissible evidence showing the other three elements of undue influence in relation to that "result" element. She has not done so. Instead she says that the other three elements may be inferred from the "result" element itself:

Since those facts and their inferences demonstrate Richard Ortega intended to pass his house to his three children, his intent must have been overcome by fraud or undue influence when he signed a deed contrary to his intent.

Response to Motion for Summary Judgment, p. 3.

The rule the Personal Representative asks the court to adopt boils down to this: Any time there is some evidence of a decedent's inter vivos verbal expression of intent as to the disposition of his property, any deed resulting in a disposition contrary to that expression must be set aside. That is clearly not the law in Idaho or anywhere else, so far as is known.

V. THE EL PASO ROAD PROPERTY NOT AT ISSUE.

The Personal Representative has claimed an interest in two properties, the Homedale house (which she calls "Richard's House") and the El Paso Road property (which she calls "Celia's House"). She has prayed for voiding of the Homedale deed to place full title in the Estate. She has prayed for voiding of the El Paso Road deed to give the Estate a one-half undivided interest along with Celia. Amended Petition, pp. 7-8.

However, the Personal Representative has not addressed the El Paso Road property in her summary judgment papers. Respondents are therefore clearly entitled to summary judgment as to that property, quieting title in Respondent Gilbert Acosta.

VI. THE PERSONAL REPRESENTATIVE IS NOT ENTITLED TO "DAMAGES ACCORDING TO PROOF."

The Personal Representative has been persistent in asserting an entitlement to "damages according to proof", albeit now only on her fraud theory. Amended Petition, p. 7, Second Cause of Action, para. 1. This claim has already been dismissed. Mem. Dec. and Order on Rule 12(b) Motion, January 3, 2011, p. 4, para. 1.

VII. THE COURT IS FREE TO DRAW REASONABLE INFERENCES.

The Personal Representative cites Mutual of Enumclaw Insurance Co. v. Pederson, 133 Idaho 135, 158, 983 P. 2d 208, 211 (1999), for the proposition that "[i]f reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the motion must be denied." Response, p. 2. However, a more correct statement of the law applicable here, where the Court will be the finder of fact if this case goes to trial, appears in Chavez v. Barrus, 146 Idaho 212, 192 P. 3d 1036 (Idaho 2008):

[W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate.

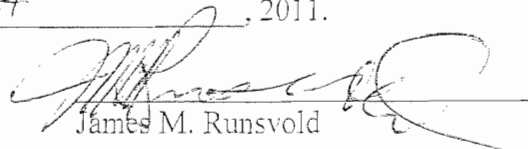
despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.

Id., 192 P.3d at 1042 (quotation marks deleted).

CONCLUSION

The Personal Representative has not presented anything – no admissible evidence, argument, or law – which would preclude the Court from entering summary judgment in Respondents' favor, on all issues.

DATED this 22 day of MARCH, 2011.

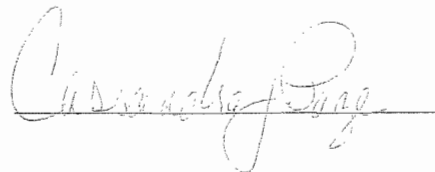

James M. Runsvold

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 22 day of MARCH, 2011, a true and correct copy of the foregoing document was sent to the following by the method indicated:

Douglas E. Fleenor
Burkett Law Office
512 N. 13th
Boise, Idaho 83702
Attorney for Personal Representative

☐ Hand Delivered
☐ Regular Mail
☐ Certified Mail-Receipt # _____
☒ Fax # 344-3370



JAMES M. RUNSVOLD
Attorney at Law ISB #2975
712 E. Albany Street
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288

FILED
MAR 31 2011
CHARLOTTE SHULTZ, CLERK
CLERK OF DISTRICT COURT
BY [Signature]

Attorney for Respondents

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF)	Case No. CV 10-01389
)	
)	RESPONDENTS'
RICHARD ENRIQUEZ ORTEGA,)	SUPPLEMENTAL CITATIONS
)	IN SUPPORT OF SUMMARY
)	JUDGMENT
)	
)	
_____ Deceased.)

POINTS AND AUTHORITIES

If a presumption arises that a deed was procured by undue influence, it does not shift the burden of proof (risk of nonpersuasion) to the party against whom the presumption operates.

Krebs v. Krebs, 114 Idaho 571,575,759 P. 2d 77,81 (Idaho App. 1988), citing to and explaining Bongiovi v. Jamison, 110 Idaho 734,718 P. 2d 1172 (Idaho 1986).

Such presumption only relieves the party in whose favor it operates from presenting further evidence of the presumed fact until the opposing party introduces substantial evidence of the nonexistence of the fact.

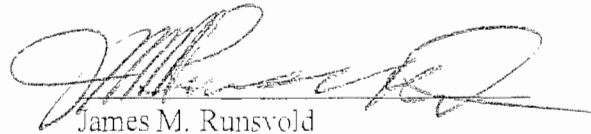
Id.

Thus, in the present case, if [the proponent] introduced evidence demonstrating

that a confidential relationship existed and evidence that [the opponent] was instrumental in procuring the deed(s), then the burden would shift to [the opponent] to come forward with evidence tending to disprove at least one of the four prima facie elements of undue influence.

Id.

DATED this 4 day of APRIL, 2011.

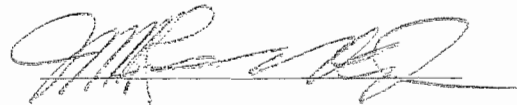

James M. Runsvold

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 4 day of APRIL, 2011, a true and correct copy of the foregoing document was sent to the following by the method indicated:

Douglas E. Fleenor
BURKETT LAW OFFICE
512 N 13th St.
Boise ID 83702

☐ Hand Delivered
☐ Regular Mail
☐ Certified Mail-Receipt # _____
☒ Fax #344-3370



*** TX REPORT ***

TRANSMISSION OK

TX/RX NO	1325	
CONNECTION TEL		3443370
SUBADDRESS		
CONNECTION ID		
ST. TIME	04/04 07:07	
USAGE T	00'21	
PGS. SENT	2	
RESULT	OK	

JAMES M. RUNSVOLD
Attorney at Law ISB #2975
712 E. Albany Street
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288

Attorney for Respondents

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF	)	Case No. CV 10-01389
)	
	)	RESPONDENTS'
RICHARD ENRIQUEZ ORTEGA,	)	SUPPLEMENTAL CITATIONS
	)	IN SUPPORT OF SUMMARY
	)	JUDGMENT
)	
)	
<u>Deceased.</u>)	

POINTS AND AUTHORITIES

If a presumption arises that a deed was procured by undue influence, it does not shift the burden of proof (risk of nonpersuasion) to the party against whom the presumption operates.

Krebs v. Krebs, 114 Idaho 571, 575, 759 P. 2d 77, 81 (Idaho App. 1988), citing to and explaining. Bongiovi v. Jamison, 110 Idaho 734, 718 P. 2d 1172 (Idaho 1986).

FILED
APR 14 2010
CLERK OF DISTRICT COURT
IDAHO

JAMES M. RUNSVOLD
Attorney at Law
623 S. Kimball Ave., Ste. C
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288
ISB #2975

Attorney for Respondents Efren A. Arizmendez and Gilbert Acosta, Jr.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF)	Case No. CV-10-01389
)	
)	<u>MOTION TO STRIKE</u>
RICHARD ENRIQUEZ ORTEGA,)	REPLY TO SUPPLEMENTAL
)	BRIEF
)	
)	
)	
_____ Deceased.)	

COME NOW Respondents Efren A. Arizmendez and Gilbert Acosta, Jr.
by and through their attorney of record James M. Runsvold and move to strike the
Personal Representative's supplemental summary judgment brief and transcripts and,
alternatively, reply thereto on the grounds and for the reasons as follows:

1. The transcripts and brief are filed and served too late to be considered by the Court,
being served 11 days after the summary judgment was argued and 25 days after the
Personal Representative's brief and affidavit were due.
2. The transcript of Celia Ortega's testimony given March 24, 2010, is hearsay and not
shown to be within any exception to the hearsay rule. It is therefore inadmissible
evidence and cannot be relied upon in opposing summary judgment. It will be noted that
Respondents were not present during such testimony nor, so far as appears, given notice
or an opportunity to cross-examine Celia. Her testimony in effect was taken in a highly

irregular procedure with the appearance to the lay witness but not the fact of court imprimatur. It clearly cannot be used as direct evidence if Celia is available as a witness and it clearly cannot be used under IRE 804(b)(1)(former testimony) if she is unavailable. It will be noted that Respondent Efren Arizmendez first appeared herein through counsel at least as early as January 12, 2010, but his counsel was not given notice of this in-court interrogation.

3. It seems to be an exaggeration to say that Gilbert participated in the preparation of the deeds. Celia's testimony was only that Gilbert, Celia, and decedent went to the title company together where "[w]e prepared them with the help of the office there in Title One". Celia Ortega Tr., p. 23, LL. 4-5. It is not clear from the testimony who "we" are or the extent to which Gilbert may have participated.

4. Gilbert did not use the word "consideration" in his testimony, so far as appears. He did not testify that decedent "received no consideration." Rather, a fair reading of his testimony is that decedent got what he wanted as consideration: his name off Celia's property, her name off his, and the Homedale property positioned to go to Efren's daughter [REDACTED] as decedent intended. Gilbert Acosta Tr., pp. 22-23.

5. The Personal Representative has to prove all 9 elements of fraud by clear and convincing evidence and the 4 elements of undue influence. She has been challenged by the summary judgment motion to come forward with her evidence on each element, and has failed to do so. She cannot simply rely upon an alleged dispute as to one portion of one element of each theory (revolving around decedent's intent as to who should get his house) or a presumption unsupported by the necessary facts and overcome in any case by Respondents' evidence to defeat summary judgment. Further, it is not unlikely and must be assumed for purposes of summary judgment that decedent told different people at different times what he intended. Some people do after all sometimes say what people want to hear. However, there is no genuine dispute as to decedent's expressions of intent at the time the deeds were signed in December, 2008. Personal Representative and her

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO	1344	
CONNECTION TEL		3443370
SUBADDRESS		
CONNECTION ID		
ST. TIME	04/07 08:54	
USAGE T	00'32	
PGS. SENT	3	
RESULT	OK	

JAMES M. RUNSVOLD
Attorney at Law
623 S. Kimball Ave., Ste. C
P.O. Box 917
Caldwell, Idaho 83606
(208) 459-2610
Fax (208) 459-0288
ISB #2975

Attorney for Respondents Efren A. Arizmendez and Gilbert Acosta, Jr.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

IN THE MATTER OF THE ESTATE OF	)	Case No. CV-10-01389
)	
	)	<u>MOTION TO STRIKE</u>
RICHARD ENRIQUEZ ORTEGA,	)	REPLY TO SUPPLEMENTAL
	)	BRIEF
)	
)	
)	
<u>Deceased.</u>)	

COME NOW Respondents Efren A. Arizmendez and Gilbert Acosta, Jr.
by and through their attorney of record James M. Runsvold and move to strike the
Personal Representative's supplemental summary judgment brief and transcripts and,
alternatively, reply thereto on the grounds and for the reasons as follows: